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SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1988

BETWEEN:

| | | |
|---|---|------------|
| EDMUND LAWRENCE | - | Appellant |
| and | | |
| ST. KITTS/NEVIS/ANGUILLA NATIONAL BANK LIMITED | - | Respondent |

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: F. Bryant for the Appellant
C. Mitchum and L. Benjamin for the Respondent

1990: March 12, 13,
Oct. 1.

JUDGMENT

MOE, J.A.

This is an appeal against a judgment of the High Court in which the learned trial Judge:- (1) awarded the appellant \$8,250.00 as one month's emoluments on his claim for sums owed and payable by the respondent under the appellant's contract of employment with the respondent; and (2) dismissed a counterclaim by the respondent for \$356,478.66 loss and damage suffered as a result of gross negligence on the part of the appellant.

Under a contract of employment between the parties the appellant was employed by the respondent as Manager. On the 8th March 1982 the St. Kitts/Nevis/Anguilla National Bank Limited (Special Provisions) Act 1982 was enacted. Shortly thereafter the appellant received the following letter:-

"St. Kitts-Nevis-Anguilla
National Bank Limited
Basseterre
St. Kitts
8th March, 1982,

Mr. Edmund Lawrence
St. Kitts-Nevis-Anguilla
National Bank Limited
Basseterre

/Dear Sir.....

Dear Sir,

I write to inform you that in consequence of the enactment of the St. Kitts-Nevis-Anquilla National Bank Limited (Special Provisions) Act 1982 a new Board of Directors has been appointed under the said Act.

I am therefore to inform you that the Board of Directors of the Bank requires you forthwith to surrender the keys, documentation and property of the Bank to the Chairman.

Yours faithfully,

William Liburd
Chairman"

This letter was quickly followed by another letter bearing the same date and reads as follows:-

"St. Kitts-Nevis-Anquilla
National Bank Limited
Basseterre
St. Kitts

8th March, 1982

Mr. Edmund Lawrence
St. Kitts-Nevis-Anquilla
National Bank Limited
Basseterre
St. Kitts

Dear Sir,

I write to inform you that the Board of Directors has taken a decision to terminate your services with immediate effect.

You are therefore required to vacate the premises immediately.

Yours faithfully,

William Liburd
Chairman"

The appellant left the Bank's premises and never returned. He received no emoluments from the respondent since February 1982.

The constitutionality of the legislation was challenged in Suit No. 16 of 1982 and on the 30th April 1982 the High Court declared the legislation to be unconstitutional, void and of no effect. On 17th May 1982 an order was made for a stay of execution of the judgment pending the termination of an appeal against the judgment.

On 1st March 1983 the Court of Appeal upheld the decision of the High Court and ordered a stay of execution of its judgment until its next sitting in September 1983 when it refused application for a further stay of execution. On 22nd October 1983 notice was given of an extraordinary

/meeting.....

meeting of the respondent for 7th November 1983. The meeting was held, the appellant was present and by resolution at that meeting the appellant's services were terminated.

The appellant claimed:-

- (1) Emoluments from 1st March 1982 to 30th November 1983;
- (2) 2 years salary in lieu of notice;
- (3) a gratuity of \$44,030.00;
- (4) a declaration of entitlement to pension in accordance with a term of his contract of employment.

The respondent denied liability for payment of any sum claimed and alleged dismissal for cause. It also counterclaimed for loss and damage suffered as a result of gross negligence on the part of the appellant.

The learned trial Judge while in no doubt that the appellant suffered loss as a result of what took place on 8th March 1982 took the view that the appellant's claim against the respondent for such loss was against the wrong party. He however found that the appellant did grant loans above his limit without the approval of the Board of Directors, that he made a loan to himself without the approval of the Board, and that he made a loan of \$145,000 to non-resident non-nationals without there being permission for the granting of such a loan as is required under section 7 of the Exchange Control Act Cap. 115 and also without any security. He further found that the appellant, although instructed by the respondent to have solicitors institute legal proceedings to collect a loan of \$145,000, was grossly negligent in failing to do so and caused the loan to become statute barred. He viewed these as matters on any of which the respondent would have been entitled to dismiss the appellant for cause. He held the appellant was dismissed for cause on 7th November 1983 and in the circumstances not entitled to gratuity or pension. He held further that the dismissal for cause nullified the effect of a clause in the appellant's contract providing for 2 years salary in lieu of notice. He held the appellant was entitled to emoluments from 1st to 8th March 1982 but took the view it was not unreasonable to pay him for the month of March.

APPEAL:

It is unnecessary to set out verbatim the various grounds of appeal filed and argued. The main ground of the appellant's complaint was
/against.....

against the learned Judge's finding that the appellant was dismissed for cause on the 7th November 1983. It was submitted first that the termination of service of the appellant in the circumstances must be considered as forced retirement. There was no merit whatever in this submission. There was evidence from the appellant himself that at the extraordinary general meeting of the respondent on the 7th November 1983 the resolution for his dismissal was passed and that he was dismissed on the 7th November 1983. He gave evidence that when he was dismissed on the 7th November 1983 no one told him that the cause of his dismissal was or included the Sheen, Webster-Antilles Petroleum matter. The second submission was that there was no evidence that the appellant was dismissed for cause. Referring to the fact that at the date of the dismissal the respondent did not state the ground for dismissal, Counsel submitted that when no cause has been shown at the time of dismissal, causes found later cannot be incorporated by reference as a cause for dismissal. Oddly enough he said his submission was based on a passage which appears at paragraph 939 Halsbury Laws of England (Third Edition) Vol. 25, referred to by the learned Judge and reads as follows:-

"It is not necessary that the master, dismissing the servant for cause, should state the ground for such dismissal; and provided good ground exist in fact it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of the dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time."

The appellant complained that the findings:-

- 1) That the appellant did grant loans above his limit without the approval of the Board of Directors;
- 2) that the appellant did make a loan to himself without the approval of the Board and at a more favourable rate of interest;
- 3) that the appellant did make a loan of \$145,000.00 to non-resident foreigners.....in breach of section 7 of the Exchange Control Act, Cap. 115.....and without security,

were unreasonable.

There was ample evidence on which the learned Judge could have come to these findings and I see no reason to interfere. There was no challenge to the finding of the learned Judge that the appellant was grossly negligent in failing to obey instructions which failure caused

/the loan.....

the loan of \$145,000.00 to become statute barred. There was therefore good ground in fact for dismissal of the appellant summarily. The fact that the ground for such dismissal was not stated at the date of the dismissal is of no import. The learned Judge's finding is sustained.

The appellant having been guilty of conduct which justified summary dismissal was in breach of his contract of employment and so disentitled to those benefits under the contract which would have been derived from his satisfactory performance of the contract. I can find no fault with the learned Judge's conclusions that the dismissal of the appellant for cause disentitled him to the benefit of the clauses of the contract providing for:-

- a) 2 years salary in lieu of notice on termination of the contract;
- b) gratuity on termination of the contract;
- c) pension at the age of 55 years.

The second ground of appeal was that the appellant having had his services terminated on 7th November 1983 is entitled to salary from 1st March 1982 to 7th November 1983. The appellant's position is that he was in the employment of the respondent during that period and therefore entitled to his monthly emoluments under his contract of employment. Counsel for the respondent did not dispute that the appellant may have suffered a loss during the period but submitted that the loss was not caused by the respondent. Counsel referred to the findings of the learned Judge that throughout the period concerned the appellant was absent from work, the respondent was deprived of the benefit of his services and his absence was without the respondent's approval. That the respondent would not be liable for any loss of wages suffered by the appellant during that period he was absent from work without the approval of the defendants. Reference was also made to paragraph 915 Vol. 25 Halsburys Laws of England (3rd Edit.) where it is stated:-

"When the contract of service is an entire contract providing for payment on the completion of a definite period of service or of a definite piece of work, it is a condition precedent to the recovery of any salary or wages in respect thereof that the service or duty shall be completely performed, unless the employer so alters.....or the contract has been frustrated, in which case the servant is entitled to recover from his employer such sum, not exceeding the value of the benefit to the employer of anything done by the servant as the court considers just."

The learned Judge appeared to have been guided by the following passage appearing at paragraph 897 vol. 25 Halsbury's Laws of England (3rd Edit.):-

"A servant....."

"A servant is under an obligation not to absent himself from work without good cause during the time at which he is required to be at work by the terms of his contract of service. If he absents himself without good cause, his master is entitled to recover damages against him for breach of contract, and the absence of the servant may if it amounts to misconduct inconsistent with the due faithful discharge by the servant of his duties, constitute good cause for his dismissal."

Counsel for the respondent conceded that in view of the Court ruling in the High Court action No. 16 of 1982 the contract of employment between the parties subsisted during the period 8th March 1982 until 7th November 1983. It was that contract of service still subsisting on that date which was terminated when the appellant was dismissed for cause. I can find no room for the application of the doctrine of frustration.

Much has been made by the respondent of the fact that the appellant did not return to work at the Bank at any time during the relevant period. Reference by the Court to the absence of any evidence that the respondent sought a reason for his absence from work or insisted that he return to work and he failed to do so evoked the response that the respondent had to await the outcome of the Court proceedings. That circumstance of awaiting the Court's decision would be equally true of the appellant. It is worthy of note that the respondent also challenged the validity of the legislation, i.e. that there was no authority in anyone other than the respondent to send home the appellant and therefore the appellant was still an employee of the respondent. In fact the respondent paid the appellant's fees in respect of the proceedings before the High Court.

The respondent recognised the appellant as its employee who on the evidence must be regarded as being away from work with the knowledge and acquiescence of the respondent, who took no steps to insist on the performance of the contract.

The general rule is that "the right to wages depends upon whether the consideration therefor has been performed. It must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of work or whether the readiness and willingness, if of ability to do so, is the consideration". Mackinnon L.J. in *O'Grady v M. Saper Ltd.* (1940) 2 K.B. 469 at 473. There is nothing in the relevant contract of employment about this and in *Petrie v MacFisheries Ltd.* (1946) 1 K.B. 258, 270, it was held that where there is nothing in the contract, expressed or implied, to the contrary, the consideration for wages is not the actual doing of the work contracted for but the readiness and willingness, if of ability, to do the work.

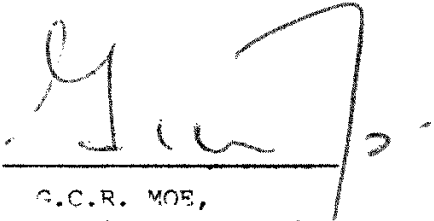
/In the.....

In the circumstances the learned Judge was in error to hold that the appellant was absent from work without the approval of the respondent during the period 8th March to 7th November 1983. The respondent cannot disclaim liability to pay the appellant his wages for the period and he is entitled to his emoluments for the period. He is therefore due 20 months and 7 days at \$8,250 per month a total of \$166,925.

The respondent complained that the learned Judge failed to grant the respondent's counterclaim for the sum of \$356,478.66 in spite of his findings of gross negligence by the appellant. The learned Judge did find as indicated earlier that the appellant was grossly negligent in failing to have solicitors institute legal proceedings to recover a loan of \$145,000 made on a Promissory Note and allowed the said loan to become statute barred. The respondent did plead that the respondent suffered loss and damage on the said Promissory Note in the sum of \$356,478.66.

The respondent was unable to point to any evidence in proof that the sum claimed was a loss incurred as a result of consequence of the negligence pleaded and proved. The loan granted on the relevant Promissory Note was made contrary to the Law. Indeed Counsel clearly stated that the sum involved was subject to forfeiture. In these circumstances the respondent would not have been in a position to enforce the contract entered into with the promises under the Promissory Note. Failure therefore to have legal proceedings instituted to recover the loan under the Promissory Note would not have caused the respondent to lose something which the respondent would have obtained. The respondent did not establish its case for damages as pleaded.

I would therefore allow the appeal, set aside the decision of the learned trial Judge and enter judgment for the appellant in the sum of \$166,925. Dismissal of the respondent's claim is affirmed. The appellant to have his costs.


 G.C.R. MOE,
 Justice of Appeal

/Bishop.....

BISHOP, C.J. (Acting)

Edmund Lawrence was employed by the St. Kitts-Nevis-Anguilla National Bank Ltd. until his services came to an end in November, 1983. He filed a claim against the Company alleging a number of breaches of his contract of employment and asking the High Court to award him \$370,241.93 damages, with interest at 10% per annum from 1st December, 1983. He also asked for an Order that he is entitled to pension at the rate of \$3,774.00 per month from his 50th birthday. The claim was made in October, 1984 and on the 16th November, 1984 the Company defended the claim alleging misconduct and gross negligence, and also counterclaimed for \$356,478.66 with interest at 10% per annum.

In a written judgment read on 6th May, 1988 Williams J. ordered that judgment be entered for Edmund Lawrence in an amount of \$8,250.00 with costs to be taxed, and he dismissed the counterclaim.

Edmund Lawrence appealed against the decision and asked that the judgment be set aside and that the relief sought in the Statement of Claim be granted. In my view the specific relief being requested ought to have been clearly stated in the Notice of Appeal, instead of referring the Court of Appeal to a pleading in the matter.

The St. Kitts-Nevis-Anguilla National Bank Ltd., through solicitors, filed a respondent's Notice of Appeal in which it asked that the decision be varied by making an order that the said Company pay to the appellant \$2,129.03 instead of \$8,250.00, with no order for costs and that there be judgment entered in favour of the Company on its counterclaim in the sum of \$356,478.66 with costs.

THE BACKGROUND

It was about mid-December, 1969 that Edmund Lawrence was appointed manager of the St. Kitts Industrial Bank Ltd. There was no agreement with respect to a salary.

At a meeting of the Board of Directors on 16th March, 1970 approval was given to the appointment of Edmund Lawrence as Managing Director of the St. Kitts Industrial Bank Ltd., which later that year, in a restructuring exercise, changed its name to First Bank of St. Kitts Ltd.

In early 1971 there was a further name change to St. Kitts-Nevis-Anguilla National Bank Ltd., herein also called the Bank. There was still no arrangement for Edmund Lawrence (the appellant) to be paid a fixed salary. He shared in the profits, if any, at the end of the financial year. Then around 1973 or 1974 there was an agreement that he would be paid a fixed monthly salary
/of \$2,000.00.

of \$2,000.00.

A record of minutes showed that at a meeting on the 29th March, 1976 the Board of Directors of the Bank accepted the following proposals of the appellant, among others: that the salary be increased to \$3,000.00 from 1st January, 1976 and that in the event of the termination of his services he be paid two years salary in lieu of notice.

In 1981, Edmund Lawrence became Chairman of the Board of Directors in addition to being Managing Director of the Bank.

On the 8th March, 1982 the St. Kitts-Nevis-Anguilla National Bank Ltd. (Special Provisions) Act 1982 became law, and on that same day the appellant received three letters, in addition to a visit at his office by six persons including William Liburd and the Commissioner of Police. The first letter was signed by the Minister of Finance. It informed Edmund Lawrence of the enactment of the aforementioned Act and that as a consequence thereof "the Directors of the St. Kitts-Nevis-Anguilla National Bank Limited have ceased to hold office and a new Board has been appointed to manage and control the affairs of the Bank". Each of the remaining letters was signed William Liburd, Chairman, and was headed with the name of the Bank and the address Basseterre, St. Kitts. One letter advised the appellant, to whom it was directed at the said Bank's address, that as a result of the Act which was passed a new Board of Directors was appointed; and it called upon him to "forthwith surrender the keys, documentation and property of the Bank to the Chairman". The other letter informed the appellant that the Board of Directors had decided to terminate his services with immediate effect and that he was "required to vacate the premises immediately". The appellant left and he never returned.

On the 15th March, 1982 the constitutionality of the above-mentioned Act was challenged, and on the 30th April, 1982 the Court held that the law was unconstitutional, null and void and of no effect. It also declared that all acts already done and all future acts done under that law are and shall be null, void and of no effect. There was an appeal which was dismissed in March, 1983 and the Court of Appeal ordered a stay of execution until September, 1983.

On the 7th November, 1983 at an extraordinary general meeting of the Bank, the following was one of two resolutions considered: "Resolved that Edmund Lawrence be and he is hereby removed from office as a Director of this Company". Edmund Lawrence attended that meeting and was present when the resolution was passed.

/Between the.....

Between the time he left the office of the Bank in March, 1982 and the end of November, 1983 Edmund Lawrence did not work for any other employer, and according to him when his services were terminated he was receiving a salary of \$6,200 per month, a housing allowance as Managing Director of \$1,000.00 per month, entertainment allowance of \$500.00 per month and director's fees of \$550.00 per month.

THE CLAIMS

Edmund Lawrence claimed (1) the Bank failed or refused to pay him - despite repeated demands - his monthly emoluments of \$3,345.33 for the period 1st March, 1982 to 30th November, 1983 and therefore owed him \$175,251.93; (2) two years salary in lieu of notice to be paid immediately on the termination of his services, a total of \$150,960; (3) a gratuity of 50% of his average monthly salary at the time of his termination for each year of his employment, such gratuity to be paid immediately on the termination of his services; and so the Bank owed him \$44,030.00 in respect of 14 years employment with the Bank; (4) a pension of 60% of his average monthly salary at the time of his termination, such pension to be paid when his services terminated at age 60 years or, in the case of earlier termination, when he reached 50 years, and (5) that he could have invested the total amount of \$370,241.93 at 10% per annum.

St. Kitts-Nevis-Anguilla National Bank Ltd. claimed by way of defence that (a) it was deprived of the services of Edmund Lawrence by an Act of Parliament from 3th March, 1982, and that he has not provided any services by way of consideration for the emoluments that were claimed. Therefore, the Bank was and liable for any of the emoluments claimed, (b) on the 7th November, 1983 Edmund Lawrence was formally dismissed by the shareholders of the said Company at a general meeting (c) the appellant was dismissed for cause "which includes but is not limited to misconduct and gross negligence in the conduct of the affairs of the Company".

It was not, in my view, good pleading to insert in the defence from which I have just quoted, the words "which includes but is not limited to" - especially when particulars of misconduct and of gross negligence were specifically set out. The Bank denied each of the allegations made by the appellant.

The Bank also counterclaimed as I indicated earlier, relying upon the following assertions of fact: (1) On the 22nd September, 1975 Edmund Lawrence granted a loan of \$145,000.00 at 10% per annum to two non-resident Americans - Milton P. Webster and Albert A. Shein of Antilles Petroleum Limited, a company with no assets locally or abroad, on promissory note 831 of 1975. (2) Edmund Lawrence failed and/or refused

/to take.....

to take proper proceedings to collect the sum due on the said note although no payments were made on the note for upwards of six years, and he allowed the period for collection of the sum due on the said note from the borrowers, to expire by limitation; and (3) the Bank suffered loss and damage on the said promissory note in the sum of \$356,479.55.

JUDGMENT

The learned trial Judge reviewed the submissions and contentions advanced by Counsel for the parties in the light of the facts adduced from Edmund Lawrence on the one hand and Claudina Lloyd, secretary of the Company on the other hand, and of documents produced at the trial. He concluded that the Minister of Finance, having acted under the enactment of 8th March, 1932 which was held to be null and void and of no effect, did so unlawfully; and he then stated:

"The defendant Company was not a party to any of the actions taken by the Minister of Finance or Mr. Liburd. the new Board of Directors was imposed on the Bank by virtue of the Act. The Bank had no say in what was taking place and they were equally a victim as was the plaintiff. Neither the Minister of Finance nor Mr. Liburd was acting on behalf of defendants..... In those circumstances it cannot be said that the defendants are liable for any action taken by the Minister of Finance or Mr. Liburd., If they or any one of them had been acting on behalf of and with the authority of the defendants, then clearly the defendants would have been liable for any loss resulting to the plaintiff by their actions and the defendants would have had no answer to any valid claims brought by the plaintiff. I have no doubt that the plaintiff suffered loss as a result of what took place on the 8th March, 1932 but so far as his claim against the defendants in that regard is concerned, in my view he has brought his claim against the wrong party."

It should be observed that there was not more than one defendant in this action and that the learned Judge entered judgment for the plaintiff against the sole defendant, the Bank.

When he was dealing with absence from work of the plaintiff, the learned trial Judge stated:

"The plaintiff's absence from work was not as a result of any act on the part of the defendants or any one acting on their behalf and with their authority. Throughout the whole period the plaintiff was absent from work, the defendant company was deprived of the benefit of his services and his absence was without their approval. Even after the issue was finally resolved by the Court of Appeal, the plaintiff did not return to work and continued to absent himself. I would have expected him at that stage to return to work or at the very least to do so when the stay of execution had expired....."

/According

According to Williams J.:

"Whatever be the cause when the plaintiff left the premises of the Bank and discontinued performing his functions and his duties as Managing Director which situation was not brought about by any action on the part of the Bank or its agents, he was in breach of his contract of service and the Bank would have been entitled to dismiss him."

Williams J. concluded that "The Bank would not be liable for any loss of wages suffered by the plaintiff during the period he was absent from work without the approval of the defendants". Then he advised that the plaintiff pursue his claim "against the person or persons who brought about the situation resulting in his loss".

The particulars of misconduct and gross negligence were pleaded with vagueness, but no further or better particulars were sought or ordered. The testimony was not restricted to the allegation particularised in the counterclaim (see above) and when the trial Judge considered the issue of loans being granted by Edmund Lawrence beyond the permissible limit and without approval, he stated that the following evidence was led: "(i) a loan of \$110,000.00 to the plaintiff himself, (ii) a loan of \$450,000.00 to Wentworth Nichols, (iii) a loan of \$110,000.00 to Fitzroy Bryant, (iv) a loan of \$52,000.00 to K.J. Mallalien & Sons and (v) a loan of \$125,242.26 to Wentworth Nichols.

The learned Judge found that the plaintiff "did grant loans above his limit without the approval of the Board of Directors, and he did make a loan to himself at a more favourable rate of interest". With respect to the loan alleged in the counterclaim, the learned Judge stated:

".....he did make a loan of \$145,000.00 to non-resident foreigners which loan although he was instructed by the Board to have solicitors institute legal proceedings to collect same, he failed to do.....;"

and he found that no part of that loan was repaid. Indeed any claim thereto was statute barred, and the learned Judge found that in this matter the appellant was grossly negligent. In addition, according to the Judge, there was a breach of section 7 of the Exchange Control Act, Cap. 115 "in that permission of the Financial Secretary was not obtained for the granting of the loan....."; further the loan was given without obtaining security, contrary to well established practice at the Bank. It was the opinion of Williams J. that "on any of the above matters the defendant company would have been entitled to dismiss the plaintiff for cause".

When he dealt with what occurred at the general meeting on the 7th November, 1983 the trial Judge held the view that it was not necessary for the company to state there the grounds for the dismissal of Edmund Lawrence,
/as long.....

as long as good grounds existed - even if they were not discovered until some time after the dismissal. In the view of the Judge the resolution passed at the meeting was a dismissal for cause and not a forced retirement. Consequently, the claims for gratuity and pension could not succeed.

So far as the claim for two years salary in lieu of notice was concerned, the learned Judge stated in his judgment: "In my view dismissal for cause would nullify the effect of this clause". (See the minutes of the meeting of 8th March, 1976). The Judge also indicated that he had "a great deal of difficulty" accepting the minutes relied upon for the proposal of two years salary in lieu of notice as a condition of employment.

After considering the law and the evidence, Williams J. found that the plaintiff was entitled to his emoluments from 1st March, 1982, and then he said this: "but taking all the circumstances of the case into consideration, I am of the view that it is not unreasonable that he should be paid his emoluments for the month of March, 1982 which amount is \$8,250.00".

THE APPEAL

Edmund Lawrence appealed on a number of grounds, not all of which were seriously pursued. The first ground was struck out by the Court acting under Order 64 Rule 3(3) and (5) of the Rules of Supreme Court, 1970, and it is of no particular assistance to recite the remaining eight grounds set out in the Notice of Appeal. Rather, I shall consider them as they were argued before us, under six heads, namely (1) the appellant's return to work, (2) the granting of loans, (3) dismissal or forced retirement on the 7th November, 1983, (4) Pension, (5) Gratuity and (6) two years salary in lieu of notice.

The St. Kitts-Nevis-Anquilla National Bank Ltd., the respondent, relied upon two grounds in its notice: (1) that the learned trial Judge erred in awarding the appellant one month's salary (\$8,250.00) when he was only entitled to eight days salary (\$2,129.03; and (2) the learned trial Judge erred in that he failed to grant the respondent's counterclaim for \$356,479.66 in spite of his finding of gross negligence on the part of the appellant.

1. Absence from work or the appellant's return to work.

Learned Counsel for the appellant submitted that there was no question of the appellant being absent from work or being able to return to work before the time of expiration of the stay of execution ordered by the Court of Appeal. He also pointed out that that Court did not sit until March,

/1984.

with whom he had a conversation. It is known from the facts as set out in the Court of appeal judgment that around 5.20 p.m. the appellants received a second letter signed "William Liburd, Chairman", similarly headed and dated to the earlier one. This letter advised Edmund Lawrence that the Board of Directors had decided to terminate his services with immediate effect and ordered him to leave the premises immediately. In a statement of facts agreed to by Counsel before the Court of Appeal, the persons who entered the Head Office of the Company, somewhere near 5.00 p.m., purported to hold meetings then and from time to time after 9th March, while remaining in control of the business affairs and assets of the Company. The evidence showed that Edmund Lawrence left the Bank after receiving the last of the three letters. Clearly, he regarded the letters as having authority and as being lawful - as any reasonable person, in similar circumstances, would have done or be expected to do - until such time as he could put the legislation which he had not yet seen, to the test. He consulted a lawyer and a week later a Motion was filed on his behalf challenging the constitutionality of the enactment. The Act of 1992 remained law until successfully challenged.

The Court of Appeal, on 1st March, 1992 affirmed the decision of the High Court, but the matter did not rest. An order for a stay of execution was made, and as I understand it, the period fixed was "until the next sitting of the Court of Appeal in September, 1993". However, due to a fire that Court did not sit again until March, 1994. The Court of Appeal also made the following statement in its judgment in 1993:

"In the final analysis the remaining question is of course whether there was a valid dismissal. The dismissal could only be legal if the law was constitutional."

With respect I do not agree with the learned trial Judge on the findings he made concerning the absence of Edmund Lawrence from work. Clearly Edmund Lawrence, like the Minister of Finance and William Liburd in his capacity as Chairman of the newly appointed Board of Directors, was acting under a law properly passed through its stages and assented to by the Governor. It was not until March, 1993 that the law was found to be unconstitutional, and then until September, 1993 - at the earliest - that there was a stay of execution of the judgment. How then can it be said that "even after the issue was finally resolved by the Court of appeal the plaintiff did not return to work and continued to absent himself"? If the stay of execution was ordered until the next sitting of the Court and that was in March, 1994 then the resolution of the Bank would have preceded the date of the expiration of the order. In any event, in my view, it could be asked, with equal confidence and probably greater significance, why did not the Board which took over from him and dismissed him, recall
/the appellants.....

the appellant to his duty? Clearly, in my opinion, it was but reasonable to expect the status quo to remain from the time that Edmund Lawrence was ordered to leave the premises until the expiration of the stay of execution.

In my considered opinion the trial Judge erred in his conclusions from the evidence of the facts and circumstances surrounding the absence of Edmund Lawrence from the Bank. Clearly he was absent from the 8th March, 1982 because he was dismissed by the existing Board of Directors of the Company and he had to await the outcome of his challenge of the law under which that Board purported to act. It could not be said that he absented himself from work, or that he did so without good reason.

2. The Loans.

I have already referred to the pleadings on this aspect, to the evidence on which the learned Judge placed emphasis, and to his findings with respect to the loans. Before us learned Counsel did not advance any serious complaint in respect of the loans made to the appellant, Fitzroy Bryant, Wentworth Nichols and K.T. Mallalieu & Sons. The gravamen of the complaint made on behalf of the appellant concerned the loan of \$145,000.00 as alleged in the counterclaim. Counsel admitted that there was evidence from which the trial Judge was justified in finding that there was a loan to non-resident foreigners; and Counsel for the respondent conceded that the loan was not made in accordance with the Exchange Control Act. However, learned Counsel for the Bank argued that since the appellant was found to be grossly negligent in the manner in which he dealt with that loan, then the Bank was entitled to recover that amount with the interest as shown on the promissory note. As I understood her, Miss Mitchum did not deny that the claim filed in November, 1984 was statute barred.

I have not been persuaded that this Court ought to interfere with the findings of the learned trial Judge made under this head.

3. Dismissal or forced retirement.

At the outset I must indicate that I do not share the view of the trial Judge that the Bank could have dismissed Edmund Lawrence because he left the Bank on the 8th March, 1982 and thereby discontinued carrying out his duties as Managing Director; nor do I agree that his leaving was not brought about by any action on the part of the Bank or its agents as then existed. I have considered his absence from work already.

/Under this....

Under this head, learned Counsel for the appellant submitted as a matter of law that there was no dismissal and that the circumstances which existed and which led to the resolution of 7th November, 1983 should be regarded as amounting to a forced retirement after he had rendered 14 years service. Again, the law was clear that in those circumstances he could not be deprived of the benefits he had earned, including pension and gratuity. Mr. Bryant also submitted that if the court were satisfied that it was not forced retirement then it should find (a) there was a very important difference between removal from office and dismissal, (b) there was no proof that the appellant was dismissed from his employment and (c) if it was a dismissal then it was not a dismissal for cause.

Counsel contended, as I understood him, that the Board of Directors could have dismissed Edmund Lawrence for cause, in his capacity as employee, but not as a Director of the Company. Counsel relied upon the appellant's evidence to disprove the allegation and finding of gross negligence. He urged that it showed that at the meeting at which the resolution was passed there were no allegations that he made any loans above his prescribed limit, without approval of the Board of Directors or that he failed to take adequate and timely steps to collect any outstanding debt owed the Bank.

I think it is appropriate here to point out that it was true to say that some facts put in cross-examination were not supported by evidence, but it is also noteworthy that the appellant admitted under cross-examination that the specific minutes of meetings of the Board of Directors showed that in 1977, the limit for a loan that he could make without obtaining approval was \$15,000.00, and in 1980 it was raised to \$30,000.00. He also admitted that in 1976 he granted a loan of \$110,000.00 to himself and there was no approval recorded in the relevant minutes. There were other loans in 1981 in excess of \$30,000.00, with no approval of them recorded in the minutes.

It was brought to Counsel's attention that on three separate occasions - under cross-examination - the appellant stated that he was dismissed on the 7th November, 1983.

Mr. Bryant, also submitted that in law, when the employee was dismissed there must be good cause and if additional causes were found subsequently then they could be mentioned. However, where no cause could be shown at the time of dismissal, then causes found subsequently could not be relied upon or incorporated by reference; and if the cause existed but was not shown at the time, then the dismissal was still wrong. Counsel contended further that (i) on the 7th November, 1983 no cause was shown to the appellant and it was not necessary since he was removed as director by the general meeting (ii) the findings of the trial Judge concerning "causes" was irrelevant to the vital issues in the case.

Learned Counsel for the respondent submitted that the evidence showed that the appellant was dismissed for cause which existed before the 7th November, 1933 and indeed that all the causes shown were in existence prior to 8th March, 1932 when Edmund Lawrence was first removed.

I have already set out the facts and circumstances surrounding and culminating in the appellant's departure from the Bank on the afternoon of 8th March, 1932. In March, 1933 in its judgment the Court of Appeal pointed out that dismissal could only be legal if the law passed in 1932 was constitutional. Until the case was finally settled at the expiration of the stay of execution the status quo remained, for obvious reasons, from the time that Edmund Lawrence was asked or ordered to leave the Bank's premises after surrendering keys, documents and property of the Bank to the Chairman, William Liburd. There was agreement that after the date of expiration of the stay of execution, in September, 1933, an extraordinary general meeting was called; and it was at that meeting that the resolution was passed which, as I understand the evidence and the conduct of the case, had the effect of dismissing Edmund Lawrence. In my view the circumstances do not support a finding of forced retirement. Rather, there was a dismissal which endured from 8th March, 1932 till 1st March, 1933 and on to September, 1933. That dismissal having been held to be null and void and of no effect there was a further and lawful dismissal which both the appellant and the Bank treated as a dismissal from duty at the Bank.

Dealing with "Dismissal without notice", at paragraph 934 of Volume 25 of the 3rd Edition of Halsbury's Laws of England, the learned author stated: "Misconduct, inconsistent with the due and faithful discharge..... of the duties for which he was engaged, is good cause for.....dismissal". The Bank pleaded misconduct on the part of the appellant and alleged as particulars: "granting loans above his limit without approval of the Board of Directors". There was evidence before him from which the learned Judge could properly find - as he did - that Edmund Lawrence granted loans above his limit without the approval of the Board of Directors.

I have already cited the assertions in the counterclaim and the findings of the learned Judge. It was, in my view, fairly open to the Judge on the evidence before him to make the findings he made about the loan of \$145,000.00. In deciding whether or not there was a duty on the Bank to provide good cause for dismissing the appellant, the learned Judge relied upon the following passage taken from paragraph 939 of Halsbury's:

/"It is not.....

"It is not necessary that the master dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time."

There was no quarrel with the application of this statement of the law to the facts before him, and it was not contended that the Bank condoned the misconduct of the appellant by allowing him to continue in office when it had full knowledge of the facts amounting to the misconduct. Nor was evidence of condonation adduced.

I am unable to say that any of the submissions and arguments made and advanced by learned Counsel for the appellant has convinced me that the learned trial Judge's findings were unreasonable or unjustified. It was a correct conclusion that the appellant was dismissed for cause and properly so.

In the light of the above, it is unnecessary, in my view, to consider the remaining heads.

On the basis of my findings, the appellant would be entitled, in my opinion, to salary and allowances for the period 1st March, 1982 to 7th November, 1983 calculated on the premise that he had been and still was receiving an amount of \$8,250.00 per month when he was ordered to leave. It was not clear to me why a month's emoluments was awarded him in the light of the finding that the plaintiff absented himself through no action by the Bank or anyone acting on its behalf, and without the Bank's approval after 3th March, 1982.

I would enter judgment for Edmund Lawrence on his claim in the sum of \$166,925.00.

As for the respondent's appeal, I have said enough to show why, in my view, the appellant should not have judgment for \$2,129.03 or eight days salary for the first eight days of March, 1982; and why the counter-claim ought not to succeed.

I would therefore dismiss the appeals, but vary the judgment for Edmund Lawrence as indicated. I would also award the costs here and below to Edmund Lawrence, to be taxed.

/E.H.A.

E.H.A. BISHOP,
Acting Chief Justice

MONICA JOSEPH,
Acting Justice of appeal